MOTION FILED
APR 24 1996

(17)

No. 95-865

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF RESPONDENT GLENDALE FEDERAL BANK, FSB

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOE G. HOLLINGSWORTH
JERRY STOUCK *
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800
Attorneys for Respondent Glendale Federal Bank, FSB
* Counsel of Record

Date: April 25, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 25.6, respondent Glendale Federal Bank, FSB ("Glendale") respectfully requests leave to file a three page supplemental brief to correct serious misstatements of the procedural record contained in petitioner's reply brief.* Although Glendale is hesitant to present the Court with additional briefing, Glendale could not have used its respondent's brief to anticipate the pe-

---

* Glendale postponed filing this motion until after oral argument in the event the issue could be adequately addressed there. Because the Court's questioning focused on other issues, Glendale seeks leave to file a short supplemental brief. Because of this Court's upcoming conference, this motion and supplemental brief were filed initially in typewritten form, pursuant to Rule 33.2. They are being refiled in printed booklet form (as required by Rule 33.1) as soon as possible. Glendale's Rule 29.6 statement is included in Brief for Respondent Glendale Federal Bank, FSB ("Glendale Br.") at ii.

titioner's misstatements of the procedural record in its reply brief.

Specifically, petitioner's reply brief asserts that, contrary to Court of Federal Claims Rule 56(d)(3), this Court should ignore the uncontroverted facts and affidavits submitted in the Court of Federal Claims because discovery "was stayed" in that court. Reply Br. at 7 n.6. Petitioner fails to inform the Court that *after* Glendale moved for summary judgment in September 1991, *petitioner* sought in October 1991 and received, over Glendale's objection, a stay of discovery that continued through petitioner's filing of its opposition to Glendale's motion for summary judgment in June 1992. *See* Defendant's Cross-Motion To Stay Proceedings On Glendale's Motion For Summary Judgment As To Liability (filed Oct. 11, 1991). This Court has held that a party may not acquiesce in, much less obtain, a delay in discovery and later request a delay in the trial court's entering summary judgment so that the same party may conduct discovery. *See First Nat'l Bank* v. *Cities Servs. Co.*, 391 U.S. 253, 291-94 (1968) (interpreting Fed. R. Civ. P. 56(f), which is identical to R.C.F.C. 56(g)).

Petitioner's reply brief also neglects to inform this Court that not only did the Court of Federal Claims deny petitioner's request for a delay in ruling on Glendale's motion for summary judgment, *see* Pet. App. 152a, petitioner did not challenge that denial on appeal, nor did it object when Glendale relied on the uncontroverted facts and affidavits in the Federal Circuit. *See* Pet. App. 16a (noting that both parties have relied "on the uncontested facts of record"); Replacement Brief of Glendale, at 4-9 & n.2, 15-16 & n.5 (filed Nov. 26, 1993) (describing such facts and quoting Rule 56(d)(3)). Indeed, petitioner's opening brief correctly observed but did not challenge that "[t]he court of appeals also relied on what it termed 'other evidence and . . . the circumstances surrounding the transaction.'" Pet. Br. at 26 (quoting Pet. App. 22a). Thus, petitioner's extremely belated objection in its reply brief to this Court to Glendale's reliance on Rule 56(d)(3) and the uncontroverted facts, negotiating history, and affidavits in the trial court record could not have been anticipated by Glendale. Petitioner's last-second attempt to rewrite the record is untimely and has been waived. *See, e.g., Sisson* v. *Ruby*, 497 U.S. 358, 359-60 n.1 (1990) (issue waived if not raised in court of appeals); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (issue waived where not raised in petition for certiorari).

For the foregoing reasons, Glendale's motion for leave to file a supplemental brief should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOE G. HOLLINGSWORTH
JERRY STOUCK *
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

Attorneys for Respondent Glendale Federal Bank, FSB

* Counsel of Record

Date: April 25, 1996

SUPPLEMENTAL BRIEF OF GLENDALE FEDERAL BANK, FSB

Glendale's brief demonstrated that the two courts below properly found FSLIC's clear contractual commitment to recognize Glendale's goodwill had been established in two independently sufficient ways: (1) the contractual language; and (2) the uncontroverted facts, *see* Court of Federal Claims Rule 56(d)(3). *See* Glendale Br. at 21-24, 32-34. This Supplemental Brief addresses the petitioner's improper request that this Court ignore the second basis. The petitioner's reply brief belatedly argues that this Court should ignore Rule 56(d)(3)—and the uncontroverted facts, affidavits, and negotiating history appearing in the record before the Court of Federal Claims—because the trial court's stay of discovery allegedly prevented the government from effectively opposing summary judgment. Reply Br. at 7 n.6. This argument contravenes fundamental rules of civil, appellate, and Supreme Court procedure.

The Court of Federal Claims properly denied petitioner's request for a delay in ruling on summary judgment, *see* Pet. App. 152a, and both it and the Federal Circuit properly relied on what these courts described as facts that were "uncontroverted" and "not disputed," including the history of "extensive negotiations" on goodwill. Pet. App. 22a, 36a, 118a-119a, 124a, 142a-143a. Such uncontroverted evidence both confirms the lower courts' interpretation of the contractual language and demonstrates that, if there were any possible linguistic ambiguity in the contractual language viewed in isolation, the government's proffered interpretation was not fair and reasonable. *See* Glendale Br. at 32 & n.24 (citing four government contract and unmistakability decisions of this Court similarly using additional evidence).

An appellate court can review denial of a request for delay under Court of Federal Claims Rule 56(g)—or its identical twin, Fed. R. Civ. P. 56(f)—only for an abuse

of discretion. *Strang* v. *United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (R.B. Ginsburg, J.); 6 *Moore's Federal Practice* (pt. 2) ¶ 56.24, at 56-804 (2d ed. 1996) (citing cases). The government's request for delay in its attorney's affidavit was properly rejected for at least three reasons.

First, the government offered no reason why it could not oppose summary judgment by obtaining affidavits from *FSLIC* officials, if they could disagree under oath with Glendale's affiants' description of the intended scope of the government's obligation under the contract. *See, e.g., Emmons* v. *McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989) (affidavit under Fed. R. Civ. P. 56(f) improper when non-movant can use own knowledge to oppose summary judgment); *Woods* v. *FHLBB*, 826 F.2d 1400, 1414 (5th Cir. 1987) (same), *cert. denied*, 485 U.S. 959 (1988).[1]

Second, because it was petitioner that obtained the stay of discovery after Glendale moved for summary judgment, petitioner cannot use its own prior delay in seeking discovery as a basis for further delay under Court of Federal Claims Rule 56(g). *See* Mot. at 1-2 (citing *First Nat'l Bank* v. *Cities Servs. Co.*, 391 U.S. 253, 291-94 (1968)); *see also* Reply Br. at 2a (government attorney's affidavit: "*defendant's* view has been that discovery is unnecessary and inappropriate in this action") (emphasis added).

Third, the requirements placed on a non-movant by Court of Federal Claims Rule 56(d) are conjunctive: material facts claimed as uncontroverted by the movant must be "included in the Statement of Genuine Issues *and* . . . controverted by affidavit or other written or oral evidence." (Emphasis added.) Nothing in Rule 56(g), or in the government attorney's affidavit in the Court of

[1] Even as to Glendale's intent, the petitioner's affidavit failed to provide the required "reason to question the veracity of [movant's] affiants." *Strang*, 864 F.2d at 861.

Federal Claims, excuses the petitioner's failure to file *any* Statement of Genuine Issues at all.

In any event, the petitioner did not challenge—either in the Federal Circuit, in its petition for certiorari, or in its opening merits brief—the denial by the Court of Federal Claims of its request for delay of that court's summary judgment ruling. Thus, petitioner's belated request in its reply brief that this Court ignore Rule 56(d)(3) and the uncontroverted facts in the trial court record has been waived. *See* Mot. at 2.

Respectfully submitted,

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOE G. HOLLINGSWORTH
JERRY STOUCK *
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

Attorneys for Respondent Glendale Federal Bank, FSB

* Counsel of Record

Date: April 25, 1996